

No. 16169 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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MOORE-McCORMACK LINES, INC.,  
Appellant,  
vs.  
LOUIS RUSSAK, Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Western District of Washington, Northern Division

FILED

JAN - 9 1958

PAUL P. O'BRIEN, CLERK



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Court of Appeals  
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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	8
Appeal:	
Bond on .....	16
Certificates of Clerk to Transcript of Record on .....	19, 21, 22
Designation of Appellee of Additional Portions of Record on (DC).....	18
Designation of Points and Designation of Record on (USCA).....	87
Notice of .....	15
Statement of Points and Designation of Record on (Appellant's-USCA).....	91
Bond on Appeal and Supersedeas Bond.....	16
Certificates of Clerk to Transcript of Record	19-22
Complaint .....	6
Designation of Points and Designation of Record (Appellant's-USCA) .....	87
Designation of Appellee of Additional Portions of Record (DC).....	18
Findings of Fact and Conclusions of Law.....	10

## ii.

Judgment .....	13
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	15
Petition for Removal.....	3
Reply to Answer to Complaint.....	10
Statement of Points and Designation of Record, Supplemental (Appellant's-USCA)....	91
Transcript of Proceedings and Testimony.....	23
Decision, Oral .....	77
Exhibit A for Defendant — Deposition of Louis Russak .....	82
Marked for Identification.....	77
Witnesses for Plaintiff:	
Russak, Deanne	
—direct .....	52
Russak, Louis	
—direct .....	24
—cross .....	35
—redirect .....	51
Witness for Defendant:	
Kayser, Robert B.	
—direct .....	56
—voir dire .....	59
—cross .....	69
—By the Court.....	74
—redirect .....	75

## NAMES AND ADDRESSES OF ATTORNEYS

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EDWIN J. FRIEDMAN,

Northern Life Tower,

Seattle 1, Washington,

Attorneys for Appellee.





United States District Court, Western District  
of Washington, Northern Division

No. 4464

LOUIS RUSSAK,

Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Dela-  
ware corporation, Defendant.

PETITION FOR REMOVAL

To: The Honorable Judges of the above entitled  
Court:

The petition of Moore-McCormack Lines, Inc., a Delaware corporation, for removal of the above entitled cause to the United States District Court for the Western District of Washington, Northern Division, from the Superior Court of King County in the State of Washington, respectfully shows:

I.

In the Superior Court of King County, Washington, Louis Russak has commenced a civil action against Moore-McCormack Lines, Inc. and the suit is now pending as Cause No. 512924. The suit involves a civil action of which the United States District Courts have original jurisdiction and is one to recover damages as more fully appears from the complaint on file in said cause, copy of which is hereto attached and marked Exhibit "A" and made a part of this petition.

## II.

Petitioner seeks removal of said Cause No. 512924 to this Court upon the ground that for the reason that the controversy in said action is between citizens of different States in that your petitioner, Moore-McCormack Lines, Inc., was at the time of the commencement of this action and still is a corporation created and existing under the laws of the State of Delaware and was then and still is a resident and citizen of said State of Delaware and not a resident or citizen of the State of Washington, whereas the plaintiff is a resident of the State of Washington.

## III.

The matter in controversy in the suit at the time of its commencement and at the present time exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

## IV.

The suit was commenced on October 3, 1957 by service of process on petitioner on that date.

## V.

Petitioner files herewith a good and sufficient bond, as provided by statute, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the cause was not removable or was improperly removed.

## VI.

Upon filing of this petition and bond for re-

moval, petitioner will give written notice of the filing of the petition and bond to plaintiff, as required by Section 1446(e) of Title 28 of the United States Code.

Wherefore, petitioner prays that said Cause No. 512924 be removed from the State Court into this District Court for trial and determination and that this Court accept and approve said Bond for removal.

Dated this 22nd day of October, 1957.

BOGLE, BOGLE & GATES,  
Attorneys for Petitioner Moore-  
McCormack Lines, Inc.

Duly Verified.

## EXHIBIT "A"

In The Superior Court of The State of Washington  
In And For The County of King

No. 512924

LOUIS RUSSAK,

Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Delaware  
corporation, Defendant.

## COMPLAINT

Comes Now the plaintiff, and for cause of action  
against the defendant, alleges:

## I.

That now and at all times hereinafter mentioned  
the defendant is a corporation organized and exist-  
ing under and by virtue of the laws of the State  
of Delaware, authorized to do business and actually  
doing business in King County, Washington. That  
said defendant was the operator of the SS "Argen-  
tina" a passenger vessel of the United States, carry-  
ing passengers for hire, and that on or about the  
10th day of March, 1957 entered into a contract  
of passage with the plaintiff on said vessel from  
New York to South American ports.

## II.

That on the 22nd day of March, 1957 said de-  
fendant failed to exercise the highest degree of care  
consistent with the practical operation of said ves-

## Exhibit "A"—(Continued)

sel in that it permitted the floor of the main lounge of that vessel to have and remain thereon spilled fruit and residue of fruit after a reasonable opportunity to remove the same. That as a direct and proximate result of the negligence of the defendant as aforesaid, while plaintiff was on the floor of said lounge plaintiff slipped and fell violently to the floor.

## III.

That as a direct and proximate result of the negligence of the defendant as aforesaid, plaintiff received a fracture of the distal shaft of the fifth metatarsal of his left foot; that he immediately suffered extreme pain and continued to suffer extreme pain. That medical attention was supplied on the vessel although such medical attention was not adequate because of a lack of facilities. That upon arrival at Bahia, Brazil, his left foot was X-rayed and a cast placed thereon upon his return to the vessel. That his foot was re-casted again following the vessel's arrival at Rio de Janeiro, Brazil, and upon the arrival at Buenos Aires, Argentina, on the 3rd day of April, plaintiff left said vessel and came under the care of hospital and physicians in Buenos Aires, Argentina. That he remained under continuous care at Buenos Aires until the 4th day of May, 1957. That although his medical bills were paid by the defendant in Buenos Aires, plaintiff incurred additional expense in the sum of \$480.00 by reason of his protracted stay in Buenos Aires, and that he has been compelled to incur additional

## Exhibit "A"—(Continued)

expense in the sum of \$62.00 for doctor bills following his return to Seattle. That plaintiff's occupation is that of a manager of auto parts stores and that he has lost opportunities of employment as such manager for a period of time by reason of the painful condition of his left foot and his inability to stand thereon. That ever since the time of said accident plaintiff has suffered, now suffers and will continue to suffer pain in and about his left foot and that his left foot has been permanently injured and weakened to his total damage in the sum of \$10,000.00.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$10,000.00 and for his costs and disbursements in this action incurred.

LEVINSON & FRIEDMAN,  
Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed October 22, 1957.

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[Title of District Court and Cause.]

## ANSWER

Comes Now the defendant and by way of answer to the complaint of plaintiff on file herein, admits, denies and alleges as follows:

## I.

Answering Paragraph I, defendant admits same.



## II.

Answering Paragraph II, defendant denies same, although admits that plaintiff reported turning his left foot while dancing on or about March 22, 1957, but denies that said occurrence was the result of any fault, neglect or liability of defendant, as alleged or otherwise.

## III.

Answering Paragraph III, defendant denies same.

For Further Answer and By Way of Affirmative Defense to the cause of action alleged by plaintiff, defendant alleges that if plaintiff sustained injury or damage as in his complaint alleged or at all, said injury and/or damage was solely and proximately caused and/or contributed to by the negligence of plaintiff in dancing in a careless manner without having full control of his body or movements as a result of his condition of sobriety or otherwise.

Wherefore, having fully answered the complaint, defendant prays that it be dismissed with prejudice and without costs and that defendant be awarded its costs and disbursements in this action incurred.

BOGLE, BOGLE & GATES,  
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed November 5, 1957.

[Title of District Court and Cause.]

### REPLY

Comes Now the plaintiff above named and for reply to defendant's answer, alleges:

#### I.

Denies each and every allegation, matter, and thing contained in defendant's Affirmative Defense.

Wherefore, having fully replied to defendant's answer, plaintiff prays for judgment as set forth in his complaint on file herein.

LEVINSON & FRIEDMAN,  
Attorneys for Plaintiff.

Duly Verified.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed January 24, 1958.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on for trial before the undersigned, one of the Judges of the above entitled Court, on the 23rd day of June, 1958, plaintiff appearing in person and by his attorneys, Levinson & Friedman, Sam L. Levinson of counsel; defendant appearing by its attorneys, Bogle, Bogle & Gates, Ronald E. McKinstry of counsel; witnesses having been duly sworn and heard and counsel



having been heard, and the Court having duly considered the matter and having heretofore rendered its oral opinion, now in accordance therewith the Court makes the following

### Findings of Fact

#### I.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Delaware, authorized to do business and actually doing business in King County, Washington. That the defendant was the operator of the SS "Argentina", a passenger vessel of the United States, carrying passengers for hire, and that on or about the 10th day of March, 1957, entered into a contract of passage with the plaintiff on said vessel from New York to South American ports.

#### II.

That on the 22nd day of March, 1957, said defendant failed to exercise the highest degree of care consistent with the practical operation of said vessel in that it permitted the floor of the main lounge of that vessel to have and remain thereon spilled fruit and residue of fruit after a reasonable opportunity to remove the same. That as a direct and proximate result of the negligence of the defendant as aforesaid, while plaintiff was on the floor of said lounge plaintiff slipped and fell violently to the floor.

#### III.

That as a direct and proximate result of the neg-

ligence of the defendant as aforesaid, plaintiff received a fracture of the distal shaft of the fifth metatarsal of his left foot; that he immediately suffered extreme pain and continued to suffer extreme pain. That medical attention was supplied on the vessel although such medical attention was not adequate because of a lack of facilities. That upon arrival at Bahiaia, Brazil, his left foot was X-rayed and a cast placed thereon upon his return to the vessel. That his foot was re-casted again following the vessel's arrival at Rio de Janeiro, Brazil, and upon the arrival at Buenos Aires, Argentina, on the 3rd day of April, 1957, plaintiff left said vessel and came under the care of hospital and physicians in Buenos Aires, Argentina. That he remained under continuous care at Buenos Aires until the 4th day of May, 1957. That plaintiff's medical bills were paid by the defendant in Buenos Aires, but that plaintiff incurred additional expense by reason of his protracted stay in Buenos Aires and that he has been compelled to incur additional expense in the sum of \$37.00 for treatment following his return to Seattle, Washington. That plaintiff's occupation is that of a manager of auto parts stores and he lost opportunities of employment as such manager for a period of time by reason of the painful condition of his left foot and his inability to stand thereon. That plaintiff has suffered pain from his injury, now suffers and will continue to suffer pain in and about his left foot and that his total damage is in the sum of \$3,500.00.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

That a judgment be entered in favor of the plaintiff and against the defendant in the sum of \$3,500.00 and plaintiff's costs to be taxed by the Clerk.

Done In Open Court this 2nd day of July, 1958.

/s/ GEO. H. BOLDT,  
Judge.

Presented by:

/s/ SAM L. LEVINSON,  
Attorney for Plaintiff.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed July 2, 1958.

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In The District Court of the United States, Western  
District of Washington, Northern Division

No. 4464

LOUIS RUSSAK, Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Delaware  
corporation, Defendant.

JUDGMENT

This Matter having come on for trial the 23rd day of June, 1958, plaintiff appearing in person and by his attorneys, Levinson & Friedman, Sam L.

Levinson of counsel; defendant appearing by its attorneys, Bogle, Bogle & Gates, Ronald E. McKinstry of counsel; witnesses having been sworn and heard and counsel having been heard, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, now therefore,

It Is Hereby Ordered that plaintiff have and recover judgment against the defendant in the sum of \$3,500.00 and his costs herein to be taxed by the Clerk.

Done In Open Court this 2nd day of July, 1958.

/s/ GEO. H. BOLDT,  
Judge.

Presented by:

/s/ SAM L. LEVINSON,  
Attorneys for Plaintiff.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed and Entered July 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Louis Russak, Plaintiff and Levinson & Friedman, his attorneys; and Clerk of the District Court:

You and Each of You are hereby given notice that the defendant, Moore-McCormack Lines, Inc., a Delaware corporation, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from each and every part of that certain judgment, including findings of fact and conclusions of law, made and entered herein by the District Court on July 2, 1958, wherein the plaintiff was awarded damages against defendant in the sum of Three Thousand Five Hundred (\$3,500.00) Dollars, together with costs and disbursements taxed in the suit.

Dated At Seattle, Washington, this 29th day of July, 1958.

BOGLE, BOGLE & GATES,  
Attorneys for Defendant and Appellant, Moore-McCormack Lines, Inc.

[Endorsed]: Filed July 29, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL AND  
SUPERSEDEAS BOND

Know All Men By These Presents: That the undersigned, Moore-McCormack Lines, Inc., a Delaware corporation, as principal, and Indemnity Insurance Company of North America, a corporation, as surety, are held and firmly bound unto the said Louis Russak, in the sum of Five Thousand (\$5,000.00) Dollars, for the payment of which, the said principal and the said surety bind themselves, their heirs and personal representative or successors, jointly and severally, firmly by these presents.

Signed, Sealed and Executed this 29th day of July, 1958.

Whereas, the above named defendant and principal has appealed to the United States Court of Appeals for the Ninth Circuit from the judgment heretofore made and entered herein under date of July 2, 1958, in favor of the plaintiff and against the defendant in the sum of Three Thousand Five Hundred (\$3,500.00) Dollars and for the costs and disbursements taxed in said suit;

Whereas, the defendant desires to effect a stay of proceedings on said judgment pending such appeal;

Now, Therefore, if the said defendant and appellant will satisfy the judgment in full together with costs, interest and damages for delay, if for



any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be null and void; otherwise to remain in full force and effect.

MOORE-McCORMACK LINES,  
INC., a Delaware corporation,

By BOGLE, BOGLE & GATES,  
Its Attorneys.

[Seal] INDEMNITY INSURANCE COM-  
PANY OF NORTH AMERICA,  
a corporation,

/s/ By HENRY R. BUCK,  
Its Attorney in fact.

Approved as to amount:

/s/ SAM L. LEVINSON,  
Attorney for Plaintiff.

The above and foregoing bond on appeal and supersedeas bond is hereby approved as to amount.

Done In Open Court this 1st day of August, 1958.

/s/ GEO. H. BOLDT,  
Judge.

[Endorsed]: Filed August 4, 1958.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Appellee, Louis Russak, designates the following additional portions of the transcript of the proceeding and evidence, to be contained in the record on appeal in this action:

Page 4—Lines 15 through 25. (All lines are inclusive.) Page 5—Lines 1 through 4, 8 through 22. Page 9—Lines 12 through 25. Page 10—Lines 1 through 17. Page 11—Lines 1 through 7, 22 through 25. Page 12—Lines 1 through 25. Page 13—Lines 1 through 7, 22 through 25. Page 14—Lines 1 through 6, 15 only, 24 through 25. Page 15—Lines 1 through 16. Page 16—Lines 3 through 14. Page 17—Lines 5 through 15, 22 through 25. Page 18—Lines 8 through 17. Page 19—Lines 3 through 5, 24 through 25. Page 20—Lines 1 through 2. Page 21—Lines 1 through 4. Page 23—Lines 14 through 18. Page 24—Lines 5 through 6. Page 26—Lines 4 through 25. Page 27—Lines 1 through 3. Page 41—Lines 14 through 25. Page 48—Lines 2 through 25. Page 49—Lines 1 through 7, 22 through 25. Page 50—Lines 1 through 19. Page 59—Lines 1 through 6. Page 64—Lines 1 through 15. Page 70—Lines 10 through 25. Page 71—Lines 1 through 10. Page 84—Lines 4 through 6. Page 95—Lines



22 through 25. Page 96—Lines 1 through 25. Page 97—Lines 1 through 25. Page 103—Lines 3 through 25. Page 104—Lines 1 through 25. Page 105—Lines 1 through 25. Page 106— Lines 1 through 2. Page 107—Lines 22 through 25. Page 108—Lines 1 through 24. Page 109—Lines 17 through 22. Page 110—Lines 15 through 25. Page 111—Lines 1 through 25.

Trial court's opinion page 124 through page 128 inclusive.

LEVINSON & FRIEDMAN,  
Attorneys for Appellee.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed September 4, 1958.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith all of the original papers in the file dealing with the action excluding Plaintiff's Exhibits 1 and 2, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San

Francisco, said papers being identified as follows:

1. Petition for Removal, filed Oct. 22, 1957, with copy of Complaint attached.

2. Bond for Removal, filed 10-22-57.

3. Notice of Filing Petition and Bond for Removal, filed Oct. 22, 1957, with copy of Petition for Removal, Complaint, and Bond for Removal attached.

4. Answer of Defendant, filed Nov. 5, 1957.

5. Reply, filed Jan. 24, 1958.

6. Demand for Jury, filed Jan. 24, 1958.

7a. Memorandum of Points and Authorities filed by Plaintiff, 6-23-58.

7. Deposition of Louis Russak, filed Jan. 29, 1958. (Marked As Defendant Ex. "A".)

8. Memorandum of Authorities filed June 23, 1958 by defendant.

9. Notice of Presentation of Findings of Fact and Conclusions of Law, Judgment and Cost Bill, filed 6-25-58.

10. Findings of Fact and Conclusions of Law, filed July 2, 1958.

11. Judgment, filed July 2, 1958.

12. Cost Bill, filed July 2, 1958.

13. Notice of Appeal, filed July 29, 1958.

14. Bond on Appeal and Supersedeas Bond, filed Aug. 4, 1958.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by appellant for prep-

aration of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00; and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 25th day of August, 1958.

[Seal]                      JOHN A. BURNS,  
Clerk,

/s/ By TRUMAN EGGER,  
Chief Deputy.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
SUPPLEMENTAL RECORD

United States of America,  
Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith supplemental to the record on appeal in this cause the following additional original papers in the file dealing with the action, said papers being identified as follows:

15. Statement of Points filed August 29, 1958.
16. Declaration of Contents of Record on Appeal filed August 29, 1958.

17. Court Reporter's Transcript of Testimony and Proceedings filed August 29, 1958.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 3rd day of September, 1958.

[Seal]

JOHN A. BURNS,  
Clerk,

/s/ By TRUMAN EGGER,  
Chief Deputy.

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[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO SECOND SUPPLEMENTAL RECORD ON APPEAL**

United States of America,  
Western District of Washington—ss.

I, John A. Burns, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transcribing herewith, supplemental to the record on appeal in this cause, the following additional original papers in the file dealing with the action, said papers being identified as follows:

18. Appellee's Designation of Additional Portions of Record on Appeal, filed Sept. 4, 1958.

19. Defendant Appellant's Supplemental Statement of Points and Designation of Record, filed Sept. 9, 1958.

Witness my hand and official seal this 18th day of September, 1958, at Seattle, Washington.

[Seal]                      JOHN A. BURNS,  
                                 Clerk,  
/s/ By TRUMAN EGGER,  
                                 Chief Deputy.

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In the District Court of the United States, Western  
District of Washington, Northern Division

No. 4464

LOUIS RUSSAK,                                              Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., a Delaware  
corporation,                                              Defendant.

TRANSCRIPT OF PROCEEDINGS

held in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on Monday, June 24, 1958, at the United States Courthouse, Seattle, Washington.

Appearances: On behalf of the plaintiff: Mr. Sam L. Levinson, Levinson & Friedman, Attorneys at law, 1602 Northern Life Tower, Seattle, Washington. On behalf of the defendant: Mr. Ronald E.

McKinstry, Bogle, Bogle, & Gates, Attorneys at law, 603 Central Building, Seattle, Washington. [1]\*

Proceedings

\* \* \* \* \*

Mr. Levinson: My name is Sam Levinson, counsel of the plaintiff, your Honor. This is an action by Louis Russak against the Moore-McCormack Steamship Company, an action which was originally instituted in the state court and removed to Federal Court by a petition on behalf of the defendant. It is an action in law. It was originally noted as a jury case by the plaintiff, and the jury has been waived by stipulation with counsel and the matter is now being tried before your Honor.

(Thereupon, an opening statement was rendered by counsel.)

LOUIS RUSSAK

plaintiff herein, called as a witness on his own behalf, being first duly sworn, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Levinson): Will you state your name, please?      A. Louis Russak.

Q. And what is your address, Mr. Russak?

A. 2549 - 29th Avenue South.

Q. And how long have you lived in Seattle?

A. Since 1923.

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\* Page numbers appearing at top of page of Reporter's Transcript of Proceedings.



(Testimony of Louis Russak.)

Q. And what is your present age?

A. What is it?

Q. How old are you?

A. I am going on 56.

Q. Mr. Russak, what has been your business?

A. My business was auto wrecking, cars and trucks and parts.

Q. And how long have you been in that business?

A. I have been in that since 1923, almost all my life that I was here.

Q. You are a married man? A. Yes.

Q. Do you have a family? A. Yes.

Q. Now, Mr. Russak, were you a passenger on the "Argentina" on a cruise? A. Yes.

Q. And what was your original plan for that trip?

A. My plan was to go from here to New York by airplane, and from New York to Buenos Aires by boat, stay there for seven days about, and then fly to Africa to see some of my brothers and sisters that I haven't seen for many years.

Q. And then what was your plan from there?

A. From there to go back to New York and then Seattle.

Q. Now, was this a first-class passage?

A. Yes.

Q. Do you remember how much your ticket on the ship cost?

A. I think it cost us close to 14 hundred dollars.

Q. That is your fare on the ship?

(Testimony of Louis Russak.)

A. Yes.

Q. And Mrs. Russak was with you?

A. Yes. [5]

\* \* \* \* \*

Q. Now, do you remember this occasion of the party when you were injured? A. Yes.

Q. Now, tell the Court just what kind of party that was and what the arrangements were.

A. On the 22nd of March the cruise director and the lady also that takes care of it arranged a fiesta, like a carnival. They issued costumes and all kinds of masks and different kinds of stuff, you know, to have a good time, anybody that wants to take part in it.

Q. Now, where was the fiesta or carnival being held?

A. Right on the dance floor where we — well, what they called it, I forget.

Q. The lounge? A. A lounge, yes.

Q. All right. Just go ahead now. Were you given numbers? [6]

A. Yes. After we came in a certain room everybody went by numbers, the first couple, second, third, fourth, and so on, and in the meantime they were making up our faces with different kinds of paint and what not so they could have a good time.

Q. Where were the couples kept?

A. They were kept in the room where they were making up their faces.

Q. Where was that room with relation to the dance floor? A. Right next door.



(Testimony of Louis Russak.)

Q. Could you see into the dance floor?

A. The door was open. Yes, we could see it.

Q. Did you watch or did you look in it?

A. Yes, we were watching just what was going on.

Q. Now, you go ahead in your own words and just tell the judge what happened.

A. Well, there was a lady from Brazil, she was taking a part there, and she had a basket with all kinds of fruit, and she was supposed to be Carmen Miranda, and when she went on the floor there, she was giving some of the fruit to the passengers, throwing it. They were asking for it.

Q. Where were the passengers seated?

A. They were sitting all around in chairs.

Q. All around what? [7]

A. On the place where the show was supposed to be, where the people were dancing.

Q. The dance floor? A. Yes.

Q. You go ahead and tell us about it.

A. And so then we went into our—we were called, so we went in to dance.

Q. About how long afterwards?

A. I would say it was about 20 or 25 minutes, something like that.

Q. Now, between the time that you saw Carmen Miranda, if we may use the term, and the time that you came in to dance, did you have—could you see the floor? A. Well——

Q. Could you see the dance floor?

A. Well, not all of it. I could see just part of it.

(Testimony of Louis Russak.)

Q. Now, during the time that you were there, did you observe anybody cleaning it up or sweeping it up?      A. No, I didn't.

Q. All right. What happened then when you were called in to dance?

A. So we started—the music started to play, and I started to dance with my wife.

Q. How many couples were out on the floor at that time all together? [8]

A. There was all together between ten and fifteen or twenty couples, something like that, that many of them.

Q. Now, you go ahead and tell the Court.

A. And I started dancing with my wife and my foot slipped, and I felt a sharp pain, and I didn't want to fall down on the floor, but I could see right next to my foot there was a little bit of moisture. It looked like a few grapes, skin of a grape.

Q. About how big an area?

A. It wasn't very big. I would say maybe five or six inches.

Q. What did you do immediately?

A. What I done, the pain was awful bad, and my wife asked what was the matter, and I said I got hurt, and I walked over to the back and sat on a chair and took my shoe off to see what was the matter with it, and while I was sitting it wasn't too bad. But after I touched my foot a certain place, there was pain, and I wasn't sure whether it was a twist or a fracture. So from there I went to my room.

(Testimony of Louis Russak.)

Q. Now, before you went to your room, did anybody come over?

A. Well, the cruise director, he came over after that, and my wife came over, and he asked what happened too. So my wife explained it to him that I hurt my foot, and then I told him there was some fruit in there, and he [9] mentioned that they will see it will never happen again. That is what he did say after that.

Mr. McKinstry: I move that be stricken as hearsay.

The Court: Overruled.

Q. (By Mr. Levinson): What happened after that?

A. After that I went to see about a doctor. Before I went to see the doctor I went to my room to take off my costume, to change, and I took my shoe off again, and my foot was awfully painful.

Q. How did you manage to get to your room?

A. Just on one foot I would say.

Q. Where was your room from that dance floor?

A. From there it was not too faraway. It was on the lower—on the second floor, I think it was.

Q. The deck below?           A. Yes.

\* \* \* \* \*

Q. Now, on what deck and where is the doctor's office? [10]

A. The doctor is, oh, I think he is on the lower deck, and it is quite a distance from the room that I had. That was on the other side of the boat.

Q. And how did you get there?

(Testimony of Louis Russak.)

A. On one foot.

Q. Did anybody hold you?

A. Not until I got to the doctor.

\* \* \* \* \*

Q. Now, when you got the doctor's office, who was there?      A. The nurse.

Q. And what did you report?

A. I told what happened, and she said, "You better wait. [11] The doctor will be in shortly."

Q. And how long afterwards did the doctor come in?

A. About ten minutes, something like that.

Q. That is the ship's doctor?      A. Yes.

Q. And what did he do or what did you do? What did you say to him?

A. I was there, and he came in and asked what happened.

Q. Did you tell him?      A. Yes.

Q. What did you tell him?

A. I told him I was dancing with my wife, and——

Mr. McKinstry: Objected as self-serving, his statement.

The Court: No, he can say what happened.

Q. (By Mr. Levinson): What did you say?

A. I explained to him that I was dancing with my wife and I slipped, my foot, and I got a terrible pain in there. I think it was—I told him it was wet in there, it was moisture, looked something like grapes, and then he told me to take off my shoe, and I did, and he felt it, the place where it was frac-

(Testimony of Louis Russak.)

tured. He didn't know what it was. It was very painful. He says, "Well, we haven't got no x-ray on the boat. We will have to wait until we get to the next port, which is Bahia, or telephone them that [12] they should pick us up and take us to a hospital or to where the doctors are."

Q. All right. Now, did he do anything about putting any bandage or anything on it?

A. At that time he didn't do anything. He only told me to go back and keep it in water, try to soak it in water, "And keep your foot up high when you go to sleep."

\* \* \* \* \*

Q. And how is it—how was it the next day?

A. The next day he told me—the doctor told me he wanted to see me. So I came over there, and he says, "I guess the best to do is put it in a cast. I am not an [13] experienced man on casts, but I watched how they do it." So he put on a cast, and he gave me two crutches and showed me how to walk on crutches.

Q. Then what time of the day was it that next day, in the morning or afternoon?

A. It was in the morning sometime.

\* \* \* \* \*

A. Then we got into Bahia.

\* \* \* \* \*

Q. Who went with you?

A. The doctor and a representative from the Moore-McCormack, [14] and also a few other passengers that went to see the doctor.



(Testimony of Louis Russak.)

Q. Tell us what happened when you got there.

A. We came to the doctor and had to wait, naturally, and the doctor there, he couldn't speak any English. He was talking Portuguese. But he knows what it is all about. So we waited about an hour or so and they x-rayed my foot. They took the cast off and x-rayed it, and it showed where it was fractured. So the doctor told me to go back. He took me back.

Q. What doctor?

A. The doctor from the boat.

Q. From the ship?

A. Yes, and they took me back out there, and they put another cast on it, and they told me to wait until we get to Rio de Janeiro. [15]

\* \* \* \* \*

Q. How many days or how far is it from Bahia to Rio?

A. I think it is about four or five days.

Q. What happened when you got to Rio?

A. We got in there in the morning, and it was a very hot day, so the doctor told me to take—he was going to take me to the hospital out there. This is in Buenos Aires.

Q. In Buenos Aires?

A. In Rio. And they took us in a cab out there. Also there was a representative from the Moore-McCormack, and we came over there and took the cast off, and they x-rayed it again, and we had to wait for the doctor. [16]

\* \* \* \* \*

(Testimony of Louis Russak.)

Q. What happened when you got to the hospital?

A. We got there, and they took the cast off and x-rayed, and it showed where it was fractured, and they told me to wait for the specialist or the orthopedist, he will put on a cast with a stepping heel so I can step on it, on my foot.

Q. He could make a walking cast?

A. With crutches I can put my foot down.

Q. Could you put your foot down before?

A. No, I couldn't because the cast was made—you know, just a cast with nothing else to support.

\* \* \* \* \*

Q. Did the orthopedic man ever show up?

A. He never did. The doctor came back and told me, "He is not going to show up," that we will have to go back to the boat. [17]

\* \* \* \* \*

Q. And what happened when you got back to the ship?

A. He put on the cast again.

Q. The same ship's doctor?

A. Yes, and I told him about getting me a heel. He couldn't find one in Rio, so they happened to have an old shoe on the boat, and they tore the heel off, and he worked it in with the cast so I can step down with my foot, you know, so I can step on it. But it didn't last too long. Inside of the next day it fell off because there wasn't no support. [18]

\* \* \* \* \*

Q. And do you remember the day your ship got into Buenos Aires?

(Testimony of Louis Russak.)

A. I think it was April the 1st.

\* \* \* \* \*

Q. Do you remember the name of the hotel?

A. Hotel Plaza. [19]

Q. And you registered there with Mrs. Russak?

A. Yes. \* \* \* \* \* [20]

Q. All right. Now, tell us how long you stayed in Buenos Aires?

A. I stayed there until May the 4th, but the doctor told me from there I should be back, he wanted to see me again. He said I should return on April the 24th. [21]

\* \* \* \* \*

Q. What happened on the 24th of April?

A. Well, the representatives from Moore-McCormack came over and took me to the hospital.

Q. What happened to your cast then?

A. They took it off. [23]

\* \* \* \* \*

Q. Now, when then did you leave Buenos Aires?

A. I left May the 4th. [24]

\* \* \* \* \*

Q. Where did you go from there?

A. I went to Capetown.

Q. And from Capetown?

A. I went back to Johannesburg and took a plane and went to New York City.

Q. What date did you arrive in New York City?

A. I think it was on June the 11th or 12th.

Q. And what did you do after that?

A. I stayed in New York, I think it was two



(Testimony of Louis Russak.)

days, and I went back to Seattle. We came back here.

Q. Now, since your return to Seattle did you go to a doctor?           A. Yes.

Q. Let me go back just a bit, Mr. Russak. When you first saw the doctor on the ship immediately after the accident, did you tell him what happened?

A. Yes.

Q. Do you know whether he made a report of that?           A. He did.

Q. What did you do about that with reference to that report?

A. I asked for that report, a copy.

Q. What did he tell you?

A. He says, "I am sorry, we don't issue any copies here. If you want any information you will have to get it from the main office in New York City from Moore-McCormack. [26]

Q. You did ask for a copy?           A. Yes. [27]

\* \* \* \* \*

Cross Examination   \* \* \* \* \*

Q. (By Mr. McKinstry): What time, approximately, did your accident aboard the ship occur?

A. It was right after dinner. It was probably between 8 and 10 o'clock. I don't remember the exact time, but it was after dinner. It was about 9 o'clock.

Q. Well, could you fix the outside limits for me?

A. Well, we had dinner there and then we came to dress, and then we came over there and spent time to make up our faces. Probably it was about 9 or 10 o'clock.

(Testimony of Louis Russak.)

Q. Would it be fair to say that it occurred sometime between 8 and 10?

A. Yes, I would say that time, yes. [41]

Q. And how soon did the masquerade start?

A. It started as soon as everybody was there and everybody had their costumes on and their faces made up, and it started right away.

Q. Well, can you give me any idea between the period of 8 and 10?

A. It would probably be about, I would say, about 9 o'clock, something like that.

Q. Well, then, your accident did not occur before 9, at least, is that right?

A. I imagine it started before, yes, everything.

Q. Your best recollection is that the masquerade started at 9?      A. Between 9 and 10 o'clock.

Q. Were you in another room?      A. Yes.

Q. Were you actually a contestant?

A. Yes.

Q. Did you precede or follow Carmen Miranda?

A. Followed.

Q. You followed her?      A. Yes.

Q. And what was your part in the contest?

A. Dancing.

Q. Was that actually a part of the contest? [42]

A. Yes. Well, everybody came out with certain dances, different parts, different acts. We were going to dance.

Q. Did your accident occur at the time that you were participating in this contest?      A. Yes.

Q. And you had your face blacked so you were

(Testimony of Louis Russak.)

participating as a colored dancer?      A. Yes.

Q. And how many other contestants were doing it at the same time?

A. At least—probably ten or twenty couples altogether.

Q. So that the masquerade or the fiesta had not actually terminated at the time that your accident occurred?

A. It terminated right away when they started to go out on the floor, and that is when they started.

Q. Were there people all the way around the dance floor?      A. Yes, there was.

Q. Standing up?

A. Some standing up and some sitting down.

Q. And were you in a room adjoining the dance floor?

A. Before we came on to the dance floor, yes.

Q. Approximately how far from the dance floor were you in the room?

A. I would say may be five or six feet, that is all.

Q. Were there several rows of people between you and the dance floor? [43]

A. No, the people were on the other side. There was an entrance where you got to come into the door from the dance place, and there was nobody there as far as—nobody sitting where the entrance was.

Q. At the time that you observed the fruit being passed out, was it being passed out off the dance floor?      A. Yes.

(Testimony of Louis Russak.)

Q. To people standing outside the dance floor?

A. Yes. She was going around.

Q. She walked all the way around the dance floor?

A. Yes.

Q. Did you observe her dropping anything?

A. Well, I couldn't say. She was throwing it, and probably some of it dropped. I don't know.

Mr. McKinstry: I move the answer be stricken.

The Court: Yes, it is not responsive.

Q. (By Mr. McKinstry): Did you see any fruit drop on the floor?

A. I didn't at that time when I was standing there.

Q. Did you at any other time?

A. The only time I saw it—no, I didn't, except after the accident happened.

Mr. McKinstry: Well, I move that part of the answer be stricken.

The Court: That is all right. Go ahead. [44]

Q. (By Mr. McKinstry): Were there any children around?

A. Yes, some children watching.

Q. Were there any children on the dance floor at the same time?

A. I don't remember seeing children there.

The Court: It is not clear to me, were you engaged in putting on your act in the contest at the time of your turning your ankle?

The Witness: Yes.

The Court: In other words, you were actually doing your routine, whatever it was?

(Testimony of Louis Russak.)

The Witness: Yes.

The Court: For the judges to see?

The Witness: That is right.

The Court: What kind of routine were you doing?

The Witness: Dancing a Russian dance.

The Court: What do you mean? Was it one of those where you go up and down and squat out?

The Witness: No.

The Court: What kind?

The Witness: Just a very plain dance.

The Court: What kind of plain dance, a plain Russian dance? That might be quite different.

The Witness: No, there is all kinds of them. It was mixed with some American dances. [45]

The Court: How did you do that?

The Witness: Just my wife, she dance like that (indicating).

The Court: Folded your arms?

The Witness: Yes.

The Court: Then what did you do?

The Witness: Nothing, just dancing there too.

\* \* \* \* \*

Q. (By Mr. McKinstry): Now, what did you mean, or what do you mean now when you called it a mixed-up dance?

A. Mixed-up, when you have lots of fun, music playing, and you dance part maybe a little Russian or a little waltz or anything almost. There is no certain steps that you dance most of the time. You dance whatever you feel like.



(Testimony of Louis Russak.)

Q. Were all of the contestants doing a different type of dance out there?

A. Some were doing different dances.

Q. Were all of you trying to perform so as to be selected from your group as the best contestant?

A. Yes.

Q. Is it fair to say that you were doing your best to be selected as the best contestant on the floor?

A. Well, yes, I did, sure.

Q. When you say a "mixed-up" dance, you were trying anything you could think of, then, to gain attention and recognition as the best contestant on the floor?

A. Well, it wasn't really that, because we just had been up for the fun more than anything else, because everybody was taking part in it, and we were together and just having a good time trying to have a good time.

Q. What kind of step were you doing at the time of your accident? [48]

A. It is really hard to tell. I think it was like the Russian dance that they dance, but I didn't jump or anything like that.

Q. How much movement is there to this Russian dance? I am not familiar with it.

A. You just—I am standing in one place almost and dancing a little bit, and my wife dances around me very slowly.

\* \* \* \* \*

Q. (By Mr. McKinstry): Do you move at all in this dance other than just shuffle your feet?

(Testimony of Louis Russak.)

A. Just one little small place there.

Q. Well, you move in a circle you indicated.

A. I move a little bit, not too faraway, and my wife dances around me.

Q. Now, when you moved, do you move to your left or right?      A. Yes.

Q. Which way do you move, to your left or right, or does it make any difference?

A. You can go to your left and right. In other words, you can go back and forth, left and right, right and left.

Q. Do you move around in a circle?

A. Yes.

Q. You actually change the direction you are facing?      A. A little bit, yes.

Q. You don't stay in one spot?

A. You just go back and forth. In other words, you don't stay in one place. It is hard for anybody to stay in one place and dance.

Q. Is it possible you could have been moving around to your left?

A. It could be possible.

Q. Did you have any occasion to notice your feet or your wife's feet or the floor at the time you were performing this dance?

A. No, we usually look straight out.

Q. Now, how did you get from where you got on the dance — first, let me ask you where on the dance floor this [50] occurred, which end?

A. It was in the middle there on the dance floor.

\* \* \* \* \*



(Testimony of Louis Russak.)

Q. And can you give us the approximate size of the dance floor there?

A. Well, I would say possibly 25 by maybe 35, something like that.

Q. Now, with relation to the dance floor, where were you?

A. The room is right here (indicating).

Q. Were people all around here (indicating)?

A. Yes.

Q. Roughly how many people were there?

A. I would say possibly several hundred.

Q. Now, when you came out on the dance floor, where did you go, which direction?

A. Well, we went up in here (indicating), and then we came out. They called our number. I think we were seventeen couples. We come out right through this door here (indicating), and we came in here to dance right here (indicating).

Q. Is that the area in which you danced?

A. Yes, in this part right here (indicating).

Q. Now, was all your dancing done in that area?

A. In that area, yes.

Q. Now, in that area were these other twenty or thirty couples dancing also?

A. After we got through some people were standing up on the side.

Q. Did they dance, one contestant at a time, or two?      A. One or two at a time.

Q. Now, at the time you were out in the floor dancing, how many other couples were dancing with you?

(Testimony of Louis Russak.)

A. There were several. I don't remember exactly. It was several couples there. I couldn't—I didn't count them. I don't remember how many it was, but there were some people there. [52]

Q. Can you indicate where in relation to our diagram the accident occurred?

A. It occurred right here somewhere, right here (indicating).

Q. Now, at the time this occurred, were all of these people watching you?

A. Yes, I guess they were.

Q. As far as you know, did they observe you slip?           A. I imagine they did.

Q. Do you know the names of any witnesses or persons?           A. Yes, I do.

Mr. Levinson: Well, just a minute. I don't think that is proper cross examination. That may be properly a subject of examination on a deposition, but I don't believe it is proper cross examination unless there is some relationship to establish some close relationship where we could establish for them not being there.

The Court: That is the only thing I was thinking about.

Mr. Levinson: If he limits it to someone close to him.

The Court: Well, actually, we haven't finished the question. He started out and Mr. Russak broke in on it, and I don't know that he finished the thought. Put a new question and let's see whether [53] there is any improvement.

(Testimony of Louis Russak.)

Q. (By Mr. McKinstry): Of your own knowledge, as distinguished from what someone may have told you, do you know of any persons that actually saw you fall? A. Yes.

Q. Who are they?

A. Well, they are people—the ones in New York City, some in Buenos Aires.

Q. Were you shuffling all the way around in that area, or did you do more than one kind of a dance in getting around to that spot?

A. Well, the dance was—we were standing in, I would say, probably six or seven feet, you know, in on the floor where we were dancing.

Q. So that you were not farther away from the spot where you slipped than six or seven feet at any time? A. Yes.

Q. And you shuffled around in that area?

A. Yes.

Q. Now, is it true, Mr. Russak, this was a very little slip, a very slight slip?

A. Well, I don't know what you mean by a slight slip.

Q. Is it fair to characterize it as a slipping a little bit?

A. My foot slipped. I don't know how little it was, and I was trying to control myself not to go down on the floor. [54]

Q. Well, I would like to have you refer to your deposition again, page 16 this time, and line 4. Did I ask you, "Do you know from talking around afterwards of anyone who saw this?" A. Yes.

(Testimony of Louis Russak.)

Q. And your answer, "Well, after there was quite a few people saw it, you know, and of course, they didn't know. You know, a person can slip a little bit and people don't pay any attention to it."

Was that your testimony? A. Yes.

Q. And did I ask you was that more or less what happened to you? A. Yes.

Q. And did you give the answer, "Yes"?

A. Yes.

Q. So then is it true that it was a very little slip? A. Yes.

Mr. Levinson: He is not asking you about the deposition any more.

The Witness: Really, I don't know what it means, a little or a big one. I slipped. I don't know whether it was little or big.

Q. (By Mr. McKinstry): You do admit that at the time of your oral discovery deposition you characterized it as "slipped [55] a little bit"?

A. Could be. Yes, it could be a little slip.

Q. Do you admit that you so testified on your oral discovery? A. Yes, I am sure I did.

Q. And did you also state as indicated there that it was such a little slip that nobody would notice it?

Mr. Levinson: That is argumentative, your Honor.

The Court: Well, if it is in there and he remembered it so, that is it. There is no use of going back and forth over it.

Q. (By Mr. McKinstry): It is your testimony

(Testimony of Louis Russak.)

here that all of this occurred before the contest ended?      A. Before the contest ended.

Q. Would you refer to page 25, please, line 4, "But you say that went on for about two hours until 10 o'clock and then you started to dance?"

Did I ask you that question?      A. Yes.

Q. And did you give the answer, "The whole thing took somewhere around an hour and a half or two hours"?

A. Yes. I don't remember exactly the time.

Q. And then, "Everybody started to dance"?

A. Yes.

Q. Did you so testify?

A. Yes, that's right. [56]

Q. Did I ask you, "Did you start to dance as soon as the band started"?

A. Yes.

Q. And did you answer, "Yes"?

A. Yes.

Q. Did you testify then, that as soon as this was over that the dancing started and you yourself started to dance after the masquerade was over?

Mr. Levinson: Are you now referring to this?

Q. (By Mr. McKinstry): First, did you so testify in oral discovery?

The Court: No, back up now, counsel, just read the text, counsel, and you follow, Mr. Russak. He is going to ask you if you so testified. Let's not get confused. Let him read lines so and so.

Q. (By Mr. McKinstry): Read line—commencing on 7.

A. Yes. "Two hours." I don't remember exactly the time when everybody started to dance.



(Testimony of Louis Russak.)

Q. And then everybody started to dance?

A. And then everybody started to dance. But I say I don't remember exactly the time.

Q. The next question and answer. Did you so testify? "Did you start to dance as soon as the band started?" You answered, "Yes."

A. Yes. [57]

Q. Is it your testimony that you first started to dance when everybody else started to dance after the masquerade?

A. No. You see, while we were in the room they called our number, I think it was 17, and as soon as we got in they announced, "Mr. and Mrs. Louie Russak," and the band started to play and we started to dance.

The Court: In the competition?

The Witness: Yes.

Q. (By Mr. McKinstry): I don't want to belabor this, but I think they are different and I would like to find out what the explanation is.

The Court: If there is something different in the text you can argue it to me later. This is what he says his version of it is now.

Mr. McKinstry: Can I ask him if he intends something different now than what he testified to on his oral discovery?

The Court: Yes, you can. I think we have covered the ground pretty thoroughly, but go ahead and ask him.

Q. (By Mr. McKinstry): Having refreshed your recollection by what you testified to on your

(Testimony of Louis Russak.)

oral discovery on page 25, is your testimony here today different than it was at that time?

A. I don't think so. It could be maybe I didn't understand [58] you, what it means when you "start to dance."

Q. That would be the only explanation you have, is that it?

A. We started to dance as soon as they called our number and name, and we came out and the music started to play and we started to dance.

Q. Do you recall any children being on the dance floor?      A. Well, maybe there was.

Mr. Levinson: That has been covered, your Honor.

Q. (By Mr. McKinstry): Let's refer to page 14, then, on line 22. Did I ask you, "How crowded was the dance floor," line 23, and did you answer, "Well, quite a few people were there. There were lots of children, and there were a lot of children there, you know, on the floor, and there may have been twenty or thirty people there, I would say."

A. Yes.

Q. So your best recollection is there were a lot of children as well as adults on the dance floor?

A. Yes, there was.

Q. Do you have any direct knowledge of your own by way of observation yourself as to how, whatever you slipped on, came to be on the floor?

A. Yes, I think I could.

The Court: You use words that throw him. Did



(Testimony of Louis Russak.)

you see yourself anything dropped on the floor in the [59] area where you later slipped?

The Witness: If I had seen it?

The Court: Did you yourself see anything dropped there?

The Witness: Well, yes.

Q. (By Mr. McKinstry): That is contrary to what you told us before.

Mr. Levinson: Do you understand the question? I am sorry, I don't mean to interrupt.

The Court: It may be he misunderstood. Now, Mr. Russak, listen carefully.

The Witness: Yes, your Honor.

The Court: Did you see yourself anything drop at that place?

The Witness: Before we came out?

The Court: Before you came out.

The Witness: No, I didn't.

Q. (By Mr. McKinstry): How much time did you spend looking at the area where you say you slipped? A. Not very much, very little.

Q. What was the color of the substance, if any, on the floor?

A. Well, it was something like grey colored, grey or brown, that kind of color it was.

Q. Do I understand it was either grey or brown?

A. Yes, mixed, I think it was. [60]

Q. Did you look anywhere else on the dance floor? A. No, I didn't look.

Q. So then you observed no other substance anywhere else on the dance floor?

(Testimony of Louis Russak.)

A. There was no reason for me to look on the floor after I got hurt. I went in the back to sit down to take the pressure from my foot.

Q. Was there any drinking at the party?

A. Not that I seen any drinking there. Maybe some people did, but I couldn't see it.

Q. Is it fair to characterize it as a rather festive occasion aboard one of these vessels?

A. What do you mean?

Q. Is it a big party aboard the ship for the trip?

A. There is quite a few of them, yes.

Q. I don't think you understand. Of all the things that go on aboard the ship, would you characterize this as the big party affair of the ship?

A. I think it is one of the happiest one where people have lots of fun.

Q. And you have no knowledge of your own as to whether there was any drinking to any extent?

A. Of course, I couldn't because I hadn't seen any drinking. There was no drinking there.

Q. Now, do you know whether there was any powder or anything [61] on the floor to make it easier to dance?

A. Well, to be honest, I don't remember that because we were in the other room, and what they did to the floor before, I can't tell because I didn't see it.

Q. Did you have any difficulty moving your feet over the floor?

A. No. It was just like regular dancing.

(Testimony of Louis Russak.)

Q. Have you ever fallen down on a dance floor?

A. Never in my life.

Q. Have you ever been on dance floors that have been highly waxed that had powder on it?

Mr. Levinson: That is argumentative, your Honor.

The Court: Yes, I think it is. It is beyond the scope of the direct.

Q. (By Mr. McKinstry): When you say you didn't spend much time looking at the spot, would you say it was just a glance?

A. I saw what it was and I started to go back because my foot hurt me so bad.

Q. Did you go back there after at any time to look at it?           A. No, I didn't. [62]

\* \* \* \* \*

### Redirect Examination

Q. (By Mr. Levinson): Coming back to your deposition on page 25 that you have there, did you also testify as follows, beginning on page 12, line—no, page 25, line 12, you said, "Yes, I was dancing when they started the dancing." Question: "That would have been some hour or so after this girl with the basket was on the floor," and your answer, "Probably. I would say a half an hour or an hour afterwards, something like that."

Did you so testify to Mr. McKinstry?

A. Yes.

Mr. Levinson: That is all.

The Court: That is all, Mr. Russak. You may step down.

(Witness excused.) [64]

## DEANNA RUSSAK

called as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows:

## Direct Examination

Q. (By Mr. Levinson): Will you state your name, please?      A. Deanna Russak.

Q. And where do you live, Mrs. Russak?

A. 2549 - 29th South.

Q. And you are the wife of Louis Russak?

A. Yes. [65]

\* \* \* \* \*

Q. (By Mr. Levinson): Now, Mrs. Russak, will you go ahead and tell the Judge just in your own words about the party that night? What was going on at the party before you went in to dance? Just tell the Judge.

A. Well, there were about sixteen or seventeen couples went on dancing, and so to go from there, there are doors about as large as this here (indicating), and we were supposed to be next. But before us was a young lady and a few more before we went.

Q. You will have to speak up.

A. Carmen Miranda, and she was throwing grapes in the corners for the people to catch. But they unfortunately didn't catch all the grapes because——

Mr. McKinstry: Just a minute.

The Court: Don't speculate. Tell us just what you saw. Go ahead. This girl was throwing grapes. Go ahead from there.

(Testimony of Deanna Russak.)

Mr. McKinstry: May I make a statement and move the part based upon conjecture be stricken?

The Court: Oh, yes, of course.

Q. (By Mr. Levinson): What happened afterwards? A. Then we went—we went in.

Q. About how long afterwards?

A. About fifteen or twenty minutes after. There were a few other couples went on.

Q. What kind of dance were you and your husband doing?

A. Well, our dance was a Russian “Kazotska” and a few other steps.

The Court: How do you do that?

The Witness: You don’t want me to do it right now, do you?

The Court: You crossed your arms or folded your arms, apparently?

The Witness: Yes.

The Court: What did you do with your feet and body in this dance?

The Witness: Well, you throw your feet out.

The Court: Throw them up in what way? Can you describe it more?

The Witness: Well, just little steps, throw your foot up, you know.

The Court: That doesn’t help me. You say, “you know.” I don’t know. I want you to tell me.

The Witness: He was dancing and I was going around him. [68]

Q. (By Mr. Levinson): You go around him?

(Testimony of Deanna Russak.)

A. Yes. Then I noticed he couldn't step. He slipped.

Q. Before we come to that, we want to know what kind of dance this is.

A. Well, just one of those little steps. You just go up on one foot, and I was dancing around him.

The Court: We want to know about this foot action. That is what we are here for.

The Witness: You know how you throw one foot up and the other one up.

Q. (By Mr. Levinson): Does he kick it high?

A. Not too high. Just, you know, a man don't usually get them too high, and then he just slipped.

The Court: Is this dance where you bend your knees and go down?

The Witness: No.

The Court: The Cossack dance.

The Witness: It's lucky he didn't dance that part.

The Court: That is not the kind of dance you are talking about?

The Witness: It is, but he didn't get to that part because the dance didn't last that long.

Q. (By Mr. Levinson): Then what happened?

A. I was dancing around him and I noticed he couldn't move [69] his foot, he slipped.

Q. What did you do about holding him?

A. I was dancing around him, and I got him—you know, my shoulder, and I took him back to the seat.



(Testimony of Deanna Russak.)

Q. At that time did you look to see what was there on the floor?

A. No. I was too concerned about him because he was in pain.

Q. Did you see anything on the floor yourself at that time?

A. I didn't bother seeing anything. I only watched that he should sit by the chair and see what was the matter.

Q. What happened when he got back to the chair?

A. He said he was going to change his clothes.

Q. What did he do about his shoe?

A. I think he come down there, and he took his shoe off right away.

Q. Did anybody come over?

A. Oh, yes, the cruise director.

Q. Did you say anything or did he say anything to the cruise director in front of you as to what happened?

A. Well, he said he hurt himself.

Q. Did he say why?

A. Well, I don't remember, it is so long ago. He went in in a few minutes and took pictures and wanted to see what it was, and it was about a spot as big as that (indicating) from a few grapes. [70]

Q. Who said that?

A. Well, the cruise director that was right there.

Q. What did the cruise director say?

A. He said——

Mr. McKinstry: I object.



(Testimony of Deanna Russak.)

The Witness: He said, "I will see this will never happen again."

The Court: Overruled.

The Witness: "We won't allow any more dances with Carmen Miranda throwing grapes." [71]

\* \* \* \* \*

ROBERT B. KAYSER

called as witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Robert B. Kayser, K-a-y-s-e-r.

Direct Examination

Q. (By Mr. McKinstry): Your present residence address?

A. Fairmont Hospital, San Leandro, California.

Q. What is your profession, sir?

A. I am a physician.

Q. Are you presently a duly licensed and practicing physician?           A. I am.

Q. In what state?

A. The States of California and New York.

\* \* \* \* \*

Q. Did you have occasion to serve as a doctor aboard the vessel S.S. Argentina under the employ of Moore-McCormack Lines?           A. I did.

Q. During what period of time did you serve in that capacity?

(Testimony of Robert B. Kayser.)

A. I served in the capacity of Ship's Surgeon from March 14 to November 18, 1957. [83]

Q. And in that capacity what were your duties aboard the vessel *Argentina*?

A. To render medical care to passengers and crew.

Q. And at my request have you come from California for the purpose of testifying here at this trial?      A. I have.

Q. Are you presently employed by Moore-McCormack?      A. No.

\* \* \* \* \*

Q. Now, directing your attention to March 22, 1957, do you recall a party that was held aboard the vessel *Argentina*?      A. I do.

Q. Would you describe for the record the nature of that party that was held at that time?

A. Well, this is a costume party that is given northbound and southbound where the passengers are invited to [84] participate in various costumes and minor acts, and it is a gala evening, actually, is what it is.

Q. How would you describe it with respect to the other types of entertainment that go on aboard the vessel during the period of the cruise?

A. Well, this is one of the bigger nights of entertainment. This probably ranks second to the Captain's farewell dinner which is held the night before Rio.

Q. Were you present on the evening when this

(Testimony of Robert B. Kayser.)

occasion occurred when this festive occasion took place?      A. I was.

Q. Do you call it a name for the type of affair?

A. Just a costume party is all I recall.

Q. Approximately what period of time does—or did the costume party cover on the date of March 22, 1957?

A. Approximately 9:15 to 11 as well as I can remember.

Q. Do you recall whether or not you were present?      A. I was present.

Q. Now, during that time were you a witness to any accident occurring to the plaintiff, Mr. Rusak?      A. I was not.

Q. Did you witness any accident or injury occurring during the time you were there?

A. I did not.

Q. Who of the ship's personnel was present that night at the [85] dance floor or about the dance floor on the first class lounge?

A. Besides myself there was a lounge steward, the cruise directress, possibly another lounge steward, and as to the executive officers, I am sure some were there, but I don't recall exactly who was. To the best of my knowledge I can't recall.

Q. What are the duties of the lounge stewards who were present?

A. Well, the lounge stewards are there for several reasons——

Mr. Levinson: I don't believe this man is quali-

(Testimony of Robert B. Kayser.)

fied to establish those duties. Apparently this was his first trip on that ship.

Th Court: We don't know about that. You might bring that out.

Mr. Levinson: He gave his series of employment.

The Court: We don't know about his knowledge.

Q. (By Mr. McKinstry): Doctor, do you have knowledge as to the duties of a lounge steward with respect to the masquerade party that takes place aboard the vessel? A. I do.

Q. Do you have knowledge as to what those duties were generally on the evening of March 22, 1957?

The Court: You are not to state what they were, but do you have such knowledge? [86]

The Witness: I have such.

Q. (By Mr. McKinstry): Now, what——

Mr. Levinson: May I ask a preliminary question on voir dire?

The Court: Just his blanket statement that he has such knowledge is not sufficient. Do you want to voir dire?

Mr. Levinson: Yes, on this alone, your Honor.

The Court: All right.

#### Examination On Voir Dire

Q. (By Mr. Levinson): I understand you joined the ship on the 14th of March, 1957, and this incident which occurred on this vessel which is the subject of this lawsuit, occurred on your first trip?

A. Yes.

(Testimony of Robert B. Kayser.)

Q. You joined it in the capacity as a ship's surgeon?      A. Yes.

Q. Were you instructed when you joined it as to any of the duties of the other officers of the ship? The question is, were you instructed?

A. No.

Q. Were you given any information as to the duties of any of the other members of the crew? [87]

A. No.

Q. Did you receive any written documents which gave the instructions of other members of the crew?

A. I did not.

Q. Then, your only knowledge that you have is in connection with your service on that ship at that time?      A. Observation.

Q. And your duty, however, is that of a ship's surgeon?      A. Yes, sir.

Q. And you maintained your office on that vessel?      A. I do.

Q. And most of your duty is performed in your offices, is it not, sir, unless you are called to see a passenger or a crew member?

A. Well, the office is open at certain times, and I frequently made cabin calls, yes.

Q. You made cabin calls?      A. Yes.

Q. And you have no other relationship, then, officially with the crew?

A. I am frequently responsible to the Captain. I am directly responsible for health and maintenance of the ship as far as public health, food, et cetera, is concerned.

(Testimony of Robert B. Kayser.)

Q. Do you check the conditions of the galley as to standards of cleanliness? [88]

A. That's right.

Q. Have you any duty in connection with the dance in the main lounge? A. I did not, no.

Q. And, then you have no official connection with any of the stewards in the main lounge, do you, sir? A. Other than——

Q. Fellow crew members? A. No.

Mr. Levinson: I renew my objection, your Honor.

The Court: It isn't quite clear to me yet, where did you get your knowledge of the duties, or how did you get the knowledge of the duties of the steward in the salon during this party?

The Witness: Well, as ship's surgeon I am expected to socialize with the passengers, and I became very friendly with one particular lounge steward by the name of Roberto, and frequently I talked to him and picked these various things up, mainly by association than anything else.

The Court: Well, it is a narrow question. I will let the proof go in, and we will concern ourselves with whether it is a matter of weight or admissibility.

Mr. Levinson: Will your Honor note an objection? [89]

The Court: Yes, of course.

Q. (By Mr. McKinstry): In addition to what you have just mentioned, have you from time to time observed the lounge steward yourself in the



(Testimony of Robert B. Kayser.)

performance of his duties in connection with the masquerade party?      A. I have.

Q. Now, based upon the knowledge which you have, would you state what the duties of a lounge steward are with respect of the party insofar as you know yourself?      A. At present?

Mr. Levinson: The same objection.

The Court: Same ruling.

The Witness: At present?

Q. (By Mr. McKinstry): Yes.

A. Well, the duties of a lounge steward are to serve drinks to the passengers when requested; to assist the cruise director with lighting; to take care of maintenance of the entire salon as the situation arises.

Q. What, if any, duties does the lounge steward have with respect of the cleaning of the dance floor in the event any substances are spilled on the dance floor?

A. From my previous experience, when anything is spilled on the dance floor, it is cleaned up immediately.

Mr. Levinson: That is objected to as not responsive, your Honor.

The Court: I understand that. It is just the form of language that you are using, Doctor. You have your language in your profession and we have it in our profession as well. It is not directly responsive. By whom is that cleaning up done?

The Witness: The lounge stewards. May I make a qualification; the room is cleaned up after



(Testimony of Robert B. Kayser.)

hours and after everybody has gone to bed by a porter. The lounge steward is to be on the job usually while passengers are in the main salon.

Q. (By Mr. McKinstry): Is there some distinction in time as to the cleaning-up work performed by the lounge steward and the clean-up work performed by the night porter?

A. The night porter doesn't come on until after the salon has been cleared of passengers.

Q. Was a lounge steward present in attendance on March 22, 1957, at the masquerade party?

A. He was.

Q. And how are you aware of that fact?

A. Because I was taking pictures in the back of the salon, and he was standing next to me during part of this procedure. He was in attendance at all times.

Q. How many contestants, approximately, were engaged in this party?

A. Well, to the best of my knowledge, I would say—recalling anywhere from thirty to thirty-five.

Q. During the time that the contestants are performing, were any of the passengers permitted on the dance floor?

A. Would you rephrase that again?

Q. If you know, during the time that this contest was in progress, were any passengers who were not actually contestants permitted to be on the dance floor?

A. No, other than the cruise director.

(Testimony of Robert B. Kayser.)

Q. Now, where was the cruise director and what were his functions?

A. Well, his function is a matter of a Master of Ceremonies, and he is by the bandstand down towards the band. He is on the dance floor.

Q. What, if anything, occurs, based upon on your experience and observations, when something is spilled on the dance floor during the course of one of these contests?

Mr. Levinson: That is objected to as not material in this instance. His general statement of what may have happened is not material.

The Court: Well, I suppose if you say what is a general practice or something of that kind, by that qualification it would be admissible. You may answer, if there is a general practice about it.

Mr. Levinson: I would like to note my objection as to the general practice too, because that is not, if I may give the reason very briefly, that practice is not the standard of care to apply.

The Court: Oh, no, of course not, not for that purpose. But it may have some probative value for other issues in the case. You may answer. What is the practice?

The Witness: Well, the general practice is when anything is spilled on the dance floor, such as water, which frequently happens, et cetera, there is a lounge steward there to clean it up immediately.

Q. (By Mr. McKinstry): What is the general practice with respect to stopping the contest or

(Testimony of Robert B. Kayser.)

doing anything along that line in terms of permitting the lounge steward to be able to do that?

Mr. Levinson: Same objection.

The Court: Same ruling. You may answer.

The Witness: From what I have previously observed, it is the general practice to—if a solution such as water is spilled on the dance floor, it is cleaned up before the show goes on.

Q. (By Mr. McKinstry): From where you were during the course of the dance, could you observe the dance floor? A. I was taking pictures.

Q. Were you taking pictures of the various contestants? A. The various contestants.

Q. Did you notice any substances such as grapes or anything else on the floor? A. No.

Q. At any time during the progress of that evening's contest, do you recall whether it was necessary to stop the proceedings for purposes of a clean up? A. I don't recall, no.

Q. Do you think that if such had occurred it would have caused you to remember it at this time?

Mr. Levinson: Objected to as argumentative.

The Court: Yes. It is a conclusion.

Q. (By Mr. McKinstry): What occurs after the contest is concluded with respect to the entertainment of the passengers?

A. Well, the lounge is kept open for the people who want to dance after the festivities, the actual program is over. There is dancing up to a specified time.

Q. What is the specified time, if you recall?

(Testimony of Robert B. Kayser.)

A. As I recall, they close sharp at 1 o'clock in the morning.

Q. Does the band remain in attendance for those who wish to dance until that time?

A. They do.

Q. Do you recall when you left the lounge area on March 22?

A. Well, I remained until the actual program was over. I don't recall exactly what time I left.

Q. Do you recall seeing Mr. Russak as a contestant or Mrs. Russak as a contestant?

A. I do not.

Q. Do you recall an act that involved black-faced dancers made up?      A. I don't.

Q. Do you recall anyone doing a Russian dance of any kind?

A. I have a vague recollection—I can't be certain as to whether it was this voyage. I see so many costumes and I see so many people in various get-ups. I do remember vaguely seeing something like that, but I can't say whether this was the voyage or not.

Q. Were you in a position through out the evening to have observed had a contestant slipped and fallen?

Mr. Levinson: That is objected to as calling for a conclusion, and his own testimony is that he was taking pictures.

The Court: Well, that is the weight——

The Witness: Yes.

(Testimony of Robert B. Kayser.)

The Court: All right. He answered. It may stand for such weight as it has.

Q. (By Mr. McKinstry): Do you recall when you first were notified, approximately, as to an incident occurring to Mr. Russak?

A. Oh, it must have been between the hours of 12 and 1. [95]

Q. Do you recall who notified you?

A. The nurse through a bellboy.

Q. Do you recall where you were at that time?

A. I do not.

Q. What did you do then?

A. I reported to the hospital.

Q. And did you examine Mr. Russak at that time? A. I did.

Q. What did you observe with respect of his foot at that time?

A. Well, he had minimal pain and minimal swelling over the lateral aspect of his left foot, as I recall.

Q. Would that be with reference to the toes or the body of the foot?

A. Well, it would be to the base of the toes actually, the main body. It is where the junction is, in that area.

Q. Based upon what he told you, do you have any idea of how much time had expired between the incident and his reporting to you?

A. Well, as I recall, he reported at approximately 12:30, and I must have seen him sometime



(Testimony of Robert B. Kayser.)

between 12:30 and 1 because it takes a certain amount of time——

Q. Did he say when this had occurred?

A. I do not recall, no.

Q. Do you know whether or not he reported to you immediately? [96]

A. I can't answer that.

Q. What was your diagnosis based upon what you observed?

A. My diagnosis was a minor sprain. The findings were not indicative of any serious pathology. I didn't think it was anything serious.

Q. Did you suggest that he should soak his foot?

A. I suggested he walk on his heel with as little weight bearing on it as possible, and I don't recall whether I told him to soak it or not.

Q. What subsequently occurred in terms of treatment furnished?

A. Well, I saw Mr. Russak the next morning. I had told him to come back and we would take a look at it, and there was at that time present very marked swelling. There was also, I can't use the word, echinosis under the skin, minimal, and at that time I became suspicious of a possible fracture and recommended he use crutches, hot soaks, and we would x-ray it on stopping at the next port. We didn't have x-ray on board.

Q. How soon thereafter did that take place?

A. The x-rays were taken at Bahia. I don't recall when we arrived. I think it was around the 25th or the 26th.



(Testimony of Robert B. Kayser.)

Q. Did you treat him thereafter?

A. A doctor in Bahia took the x-rays, and there was a fracture. Upon arrival back to the ship, as I recall, we put a cast on the foot. [100]

\* \* \* \* \*

### Cross Examination

Q. (By Mr .Levinson): Dr. Kayser, as a ship's surgeon on your office hours when you are not acting as a surgeon, it is part of your job to mix with the passengers, isn't it? A. Yes.

Q. You have certain social functions that you take care of? A. Yes.

Q. Usually on a ship of this type the unattached ladies are quite interested in the ship's doctor?

A. On this voyage there wasn't anything very interesting.

Q. Doctor, your presence on the night of this gala party wasn't in any official capacity except with mixing with the passengers?

A. As an observer, and being my first trip I wanted some pictures.

Q. And you were much concerned with the pictures?

A. Not too much. I had my camera there for what I thought was worth while taking.

Q. And you were not concerned with the condition of the floor or what was going on at that time, were you?

A. At this time, normally from my previous experience and future voyages, I frequently would tell the lounge steward, if I saw something, to clean

(Testimony of Robert B. Kayser.)

it up, as did the cruise director. This voyage I saw nothing. [101]

Q. So you were just there with your camera taking some pictures? A. That's right.

Q. And you have no recollection, as a matter of fact, of the Russaks at that time? They were just two of how many passengers?

A. The whole boat. I think we had a full complement boat of first-class passengers.

Q. And most of them were in the lounge?

A. Most of them were in the lounge.

Q. And, Doctor, do you recall anyone who acted as Carmen Miranda? A. I do not.

Q. That is not an unusual costume from your experience as you later learned, that some girl decides she wants to be a South American beauty and goes around with a basket of fruit?

A. I don't recall a Carmen Miranda.

Q. Do you recall any of them with a native costume and a basket of fruit at any time?

A. I recall one, not as a native, but Nero and his daughter. She carried fruit. That is all.

Q. And passed it around among the passengers?

A. No, I don't recall that.

Q. There could have been one that evening and you probably [102] would have no recollection of it? A. That is being fair.

Q. Now, Doctor, the steward, Roberto, is he still on the ship?

A. No, he left us one or two voyages later.

Q. But he was on the ship? A. Yes.

(Testimony of Robert B. Kayser.)

Q. And the cruise director, do you know whether he is still on the ship?

A. The cruise director, the last I heard, is still on the ship.

Q. And his wife, I assume?

A. He is a single man.

Q. Or the assistant cruise director, the woman, is she still on the ship?

A. To my last knowledge.

Q. They were around all the time? A. Yes.

Q. That is their job? A. Yes.

Q. Now, Doctor, you keep a medical log, don't you, on that ship? A. I do.

Q. And you report all that occurs with reference to your job, isn't that right, medically? [103]

A. I do.

Q. Now, when you were notified of the accident, the bellboy had to go find you? You weren't in your quarters all the time and weren't expected to be?

A. I don't recall where I was.

Q. How do you fix the time of 12:30 or quarter after 12?

A. Well, I briefly reviewed the logs, my own logs, for my own edification. I don't recall minor facts.

Q. You reviewed them with Mr. McKinstry?

A. Yes.

Q. And other than that, it would have been difficult to remember the time, wouldn't it?

A. Well, I happened to remember the time because I was either just getting ready to go to bed

(Testimony of Robert B. Kayser.)

or was headed that way, but I remember it was late. It was after the main event was over.

Q. You, of course, had some discussion with Mr. Russak at that time? A. I did.

Q. Asking the circumstances and all of that?

A. Yes.

Q. And there was some complaint, the complaint about his foot?

A. There was. He had pain in his foot.

Q. There wasn't any question in your mind that it was painful? [104]

A. It was painful, sure, but every pain is a subjective thing.

Q. And different people have different evidence of it? Some are very phlegmatic and some more noticeable? A. Surely.

Q. And, Doctor, when you saw him the next day, you were then a little concerned? You realized there was something more than just a sprain?

A. Well, until the time the x-ray was taken I wasn't sure whether there was a fracture or not. I was giving him the benefit of the doubt because frequently sprains can mimic fractures and fractures can mimic sprains.

Q. And the following day there was no question but that he was suffering a great deal of pain?

A. I think he had a moderate amount of pain.

Q. And that was true up to the time that you casted it when you left Bahia, or did you cast it before?

(Testimony of Robert B. Kayser.)

A. We casted it after we left Bahia, if my memory serves me right.

Q. There was no cast on it, to your recollection, between the time of the accident—— A. No.

Q. When you don't cast a foot that you subsequently learn is broken, any movement is quite painful, isn't it?

A. You are getting into the field of medicine.

Q. I would like to find something out about it.

A. This is a relative subjective thing. [106]

Q. Pain is?

\* \* \* \* \*

Q. Now, when you got to Buenos Aires, you were sufficiently concerned to suggest to the claims agent or to Moore-McCormack that the steamship company—that he have some real adequate treatment with the proper casting by an [107] orthopedic man? A. Rephrase that for me.

Q. All right. When you arrived——

The Court: There was a subtlety, and I was wondering whether you meant it and he got it.

The Witness: I got it.

Q. (By Mr. Levinson): When you got to Rio you thought that Mr. Russak should have some care and orthopedic treatment?

A. Well, Mr. Russak is kind of a labile individual as far as pain is concerned, and I took him to an orthopedic man to cover myself. This is a matter of calling in consultation to be sure.

Q. Well, this really wasn't a consultation be-



(Testimony of Robert B. Kayser.)

cause you had nothing to do with it after you got to Buenos Aires.

A. As long as he is on the ship he is my responsibility. When he leaves the ship he is not.

Q. When he left the ship it was your idea he get some further treatment? A. Yes.

Q. What was the reason that you thought he should receive some further attention?

A. Because he had been having trouble with this cast. Apparently it had been bothering him. He was quite concerned, and I turned him over to our claims agent. [108]

\* \* \* \* \*

Q. Well, Doctor, as far as you were concerned, you were through when you turned him over to the claims agent in Buenos Aires, and you sent your report along with him? A. Yes.

Q. And you did send along a report?

A. Yes. [109]

\* \* \* \* \*

### Examination

Q. (By the Court): Doctor, either at the time that you first saw Mr. Russak or any of the times you were treating him there on the ship, did he make any statement to you concerning how it came about that he sustained this injury?

A. I vaguely remember something about grapes, at a later date. This was not brought out at my initial visit which was approximately between 12:30 and 1. May I explain; the nurse, when a patient comes in, especially an injury to someone, a pas-



(Testimony of Robert B. Kayser.)

senger on the boat, takes a statement from the passenger in the passenger's own words. [110]

Q. That is what I was going to ask you. Isn't it a practice—or is it a practice to take a statement from the injured person at the earliest time feasible? A. This was done.

Q. And such was done, was it? A. Yes.

The Court: That is all.

Mr. Levinson: Nothing further.

Redirect Examination

Q. (By Mr. McKinstry): In connection with those statements and the records made to the nurse, you had occasion to review those records? Did you review those records or photostatic copies of those records? A. Yes.

Q. Was anything said in the records upon his first contacting the nurse about slipping on a grape?

Mr. Levinson: Objected to.

The Court: Sustained. The record itself, of course, is the best evidence.

The Witness: No.

The Court: The answer is stricken. That is all. Is there anything further?

Mr. McKinstry: No, your Honor. [111]

\* \* \* \* \*

Mr. McKinstry: If it please the Court, I have no further witnesses. I would like, with the Court's permission, to have the oral discovery marked as an exhibit and offered as our evidence of the facts as distinguished from impeachment purposes. I

think under the rule that I am entitled to have that offered into evidence as evidence.

The Court: I don't think so, Mr. McKinstry. Where the witness is on hand and available to testify and takes the stand, he must be interrogated [121] firsthand, and if there be anything in his previous testimony that counsel contends is impeaching or varies from what he then says, that portion of the testimony may be offered. But just to offer the transcript as a whole is, in my judgment, not proper practice.

Mr. Levinson: I am going to object to that for the record.

The Court: And I am sustaining it at the same time.

Mr. McKinstry: May I ask if your Honor's ruling is that I would have to pick out certain portions to offer as evidence?

The Court: The thing you would have had to have done, while the witness was on the stand, to interrogate him about anything in the transcript that you considered was at variance with his testimony here, and if you desired to interrogate him about subject matter not directly covered in the direct examination, you could do that first, and see what he says about it, and then if he says something about it that is at variance with the transcript, you could confront him with the transcript. That is the due and ancient form in cases made and provided.

Mr. McKinstry: If I may have an objection

[122] noted because I would like to offer it as evidence as distinguished from——

The Court: You have done that, and I have denied it. Exception allowed.

Mr. McKinstry: Should I have it marked and offered and refused?

The Court: As you please. It is a part of the record without it. But you can do as you please about it. Make it an exhibit number, please.

The Clerk: Defendant's Exhibit A has been marked for identification.

[See page 82.]

The Court: This is the exhibit to which reference was just made and the offer and rejection.

\* \* \* \* \*

The Court: Of course, the evidence is far from as satisfactory, clear, and definite as all of us, the plaintiff, the defense, and the Court might wish. This is a weakness, if you want to call it that, inherent in a case of this kind. I suppose that I have handled hundreds of them and I have tried dozens of them and feel some familiarity with the practicalities of such a case.

Russak and his wife were at the ship fiesta having a good time. That is what they paid their cruise passage money for. The party was arranged as a gala affair with the idea that people could be care-free and have fun, frolic about, and even do the kazotska dance. Suddenly an incident like this happens, and, of course, they happen not infrequently. The person injured in such an incident isn't going to stop and minutely examine conditions and

get photographs thereof. He is going to look down to see what caused his injury, and seeing something there, is going to look at it. But his ankle is pain-ing him, and he goes over and gets out of the way of other performers and hopes that by the next round he will be able to answer the bell. It is a perfectly natural, normal reaction.

Unfortunately, it leaves the proof about the situation somewhat vague and not near as clear-cut and satisfactory as it might be, especially if the witnesses are honest. If they are not honest, the evidence often is remarkably clear, sharp, [124] and specific. Things are remembered much more sharply and clearly. In some cases the very positiveness of the proof becomes a matter of suspicion.

Under the evidence in this case, I think I would have no right at all to question the fact that there was some foreign substance on the floor. I don't think there is anything inherently incredible about the testimony of Mr. Russak. The Russaks appeal to me as being as frank and objective as litigants in this kind of a case can be expected to be. The fact that the evidence shows a report was made about this incident at the time, which report has not been produced by defendant, requires me to find that there was some foreign substance on the floor where Russak slipped, and that in all possibility it was a foreign substance similar to grapes.

That, of course, does not establish liability. If that was all there was in the evidence, it would be an end of the case because we all know that the grapes or substance could have been dropped an

instant before Russak's injury, and the defendant's servants would have had no reasonable opportunity to remove it. A time factor must be shown in such a slipping case which would allow the employees of defendant an opportunity in the exercise of the highest degree of care for the safety of passengers, to remove the material from the floor. I think such a period of time at a crowded party on a dance floor with a lot of people milling around and performing on [125] the floor would be a very brief period because somebody might come along and slip and be injured very soon after the substance was on the floor. A very short period of time, it seems to me, would be long enough to permit one or another of the several employees of the defendant who were in the hall to see and remove the foreign substance from that small area of floor space. The doctor and steward were there, and I think the doctor said one or two other employees were in the salon. They would have to watch conditions pretty closely, particularly if some gal was throwing fruit around among the guests.

Russak and his wife positively say there was a gal throwing fruit around in the salon. It is not absolutely clear and satisfactory, but I am inclined to think that under the state of the evidence I have got to accept it as the fact. The doctor couldn't remember anybody doing the Carmen Miranda act, but I noticed he wasn't asked if he recalled anybody passing fruit around. He did say one of the women was done up as Nero's daughter and had some fruit. In the face of the positive, and I think



credible statements of the Russaks, I find there was somebody passing or tossing fruit around at the party. If somebody was either tossing fruit or passing it around in those crowded quarters or on that dance floor, the employees of the defendant had the duty to keep a close and sharp eye on the proceedings and see to it that the fruit did [126] not land on the dance floor where somebody might be hurt by it.

It may be a somewhat thin case. The evidence is not, as I say, anywhere near as substantial as it might be. But I think it is substantial enough to show that this material was probably on the floor and that it could and should have been removed prior to Russak's injury. Reasonable probability is all that is required, and I have got to judge it by the evidence that is offered to me, not by my independent explorations and suspicions and speculations. It must be judged as best I can with my limited intelligence and experience on such evidence as is submitted to me.

My judgment is that the evidence is sufficient, although I must say not abundantly sufficient, particularly considering that a high degree of care is required for the protection of passengers. Therefore, I find liability established.

With liability established, I have no right to minimize the recovery by the fact that a close or narrow issue was presented on liability. The plaintiff is entitled to be fully compensated for all injury and damage reasonably flowing from this incident. It may well be that some other individual



would have been able to resist the injury more successfully than Russak. It is quite apparent that he is one of those persons who would be more seriously affected in the way of pain, discomfort, and complaints, real or fancied, by such an incident, than some other more hardy soul might be. [127] But that is no basis for diminishing the award to him. The amount of damage has been fully considered, but no matter how long I thought or talked about it, the final result would still actually be a figure more or less taken out of the blue.

Allowing for all factors, it seems to me that an award of \$3500 for all elements of damage is fair and reasonable. That may be on the high side from the defendant's point of view and a bit on the low side from the plaintiff's point of view. On the basis of the evidence that I have heard here, I cannot honestly say that if it were my foot injured as Russak's was, that I would feel overly paid for the pain, suffering, inconvenience, and other disagreeable consequences of this injury by an award of that amount.

It is so ordered.

Recess subject to call.

(Thereupon, the court recessed subject to call.) [128]

[Endorsed]: Filed August 29, 1958.

## DEFENDANT'S EXHIBIT "A"

[For Identification]

[Title of District Court and Cause.]

## DEPOSITION OF LOUIS RUSSAK

Seattle, Washington, Dec. 18, 1957

Appearances: Sam L. Levinson, Esq., of Messrs. Levinson & Friedman, 1602 North Life Tower, Seattle, Washington, appearing for and on behalf of the plaintiff.

Ronald E. McKinstry, Esq., of Messrs. Bogle, Bogle & Gates, 603 Central Building, Seattle, Washington, appearing for and on behalf of the defendant.

Deposition upon oral examination before trial of Louis Russak, taken at the instance of the plaintiff in the above entitled cause, pending in the District Court of the United States for the Western District of Washington, Northern Division, pursuant to oral agreement of counsel for the respective parties, before Clifford C. Doiron, a notary public in and for the State of Washington, at 1602 Northern Life Tower, Seattle, Washington, [1]\* on the 18th day of December, 1957, at the hour of 11:00 o'clock A.M.

It was stipulated by and between counsel for the respective parties that all objections except as to the form of questions or the responsiveness of the answers thereto are reserved until the time of trial.

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\* Page numbers appearing at bottom of page of Reporter's Transcript of Record.

Defendant's Exhibit "A"—(Continued)

LOUIS RUSSAK

Being first duly sworn in the above cause, testified on his oath as follows:

By Mr. McKinstry: [2]

\* \* \* \* \*

Q. Approximately what time did that occur?

A. I imagine it was between—I would say 8:00 and 9:30, somewhere around that time. [8]

\* \* \* \* \*

Q. Do they have waiters that would bring the drinks into this main lounge?

A. They would if you asked for it, probably, yes.

Q. How long were you in this lounge up until the time of your accident?

A. I would say a half hour—20 minutes, something like that.

Q. 20 minutes to a half hour?

A. Yes. [10]

\* \* \* \* \*

Q. You didn't actually fall down?

A. No, I tried to control myself not to fall down.

Q. You were able to keep yourself from falling down? A. Yes.

\* \* \* \* \*

Q. How crowded was the dance floor?

A. Well, quite a few people were there. There was lots of children and there were—there were a lot of children there, you know, on the floor, and there may have been 20 [14] or 30 people there, I would say.

\* \* \* \* \*

Defendant's Exhibit "A"—(Continued)  
(Deposition of Louis Russak.)

Q. Did anyone on the dance floor stop and ask you what happened other than your wife?

A. No, I don't think so. There were quite a few people. [15] You see, the people were dancing in the center and in the back there were several hundred people, I suppose. It was a big affair.

Q. Do you know from talking around afterwards of anybody who saw this?

A. Well, after—there was quite a few people saw it, you know, and, of course, they didn't know. You know, a person can slip a little bit and people don't pay any attention to it.

Q. Was that more or less what happened to you?      A. Yes. [16]

\* \* \* \* \*

Q. How much of an examination of the floor did you make then?

A. Well, after I did slip a little bit there was a little bit of fruit I saw.

Q. That is what I mean. How much time did you actually spend in looking at it?

A. I didn't spend too much time. I just looked at what happened, why I slipped, you see.

Q. What makes you say it was fruit juice rather than water?

Mr. Levinson: He didn't say fruit juice.

A. I didn't say fruit juice—fruit. [17]

Q. I beg your pardon. Describe what you saw.

A. What I saw looks like fruit, like skin from grapes.

Q. What color was it?

Defendant's Exhibit "A"—(Continued)  
(Deposition of Louis Russak.)

A. Well, it is grape color, you know what grape color.

Q. There are different kinds of grapes.

A. They had all kinds of grapes there.

Mr. Levinson: Let me tell you something, Mr. Russak, for the record. In these kind of cases when a lawyer tries to get these various answers he tries to break it down into one little piece, two little pieces and three little pieces and so on to make you look silly, like when he was trying to get you to tell him exactly how you fell, and you are an honest man and don't follow along with his suggestions. If you remember him, tell him, but if you don't, tell him you don't remember. Don't follow along with him because those are typical defense tactics. Just tell him exactly what you did or if you don't remember just tell him you have no recollection of what happened at the time. He has it broken down to, "Did you slip a foot or two or three feet to the side," and they always do it, but don't go along with that. Just tell what happened.

Mr. McKinstry: For the record I am going to ask that the Court point out to counsel that he is now coaching the witness, and I think it is not proper to do so.

On the contrary, I wasn't there, Mr. Russak, [18] and I am simply trying to find out all I can that you know. Counsel would suggest that I would have you give me an answer if you don't know the answer. I don't want that. If you don't know the answer, just simply indicate that you don't know.



Defendant's Exhibit "A"—(Continued)  
(Deposition of Louis Russak.)

Mr. Levinson: Let's make that clear.

The Witness: You asked about the grapes.

Q. (By Mr. McKinstry): If you don't know the color—— A. I don't. [19]

\* \* \* \* \*

Q. The dancing, as I understand it, did not start until after the contestants were through?

A. That's right?

Q. I misunderstood one of your earlier answers then. I asked you what time the injury occurred and I thought you said [24] some time between 8:00 and 9:00.

A. It is hard to tell exactly the time, you know. We started I think about 8:00 o'clock. That is when we started.

Q. But you say that went on for about two hours until 10:00 o'clock and then you started to dance?

A. The whole thing took somewhere around an hour and a half or two hours. I don't remember exactly the time, and then everybody started to dance.

Q. Did you start to dance as soon as the band started? A. Yes.

Q. You were dancing the first number after this?

A. Yes, I was dancing when they started dancing. [25]

\* \* \* \* \*

[Endorsed]: Filed January 29, 1958.



[Endorsed]: No. 16169. United States Court of Appeals for the Ninth Circuit. Moore-McCormack Lines, Inc., Appellant, vs. Louis Russak, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 26, 1958.

Docketed: September 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals  
for the Ninth Circuit

No. 16169

MOORE-McCORMACK LINES, Inc., a Delaware  
Corporation, Appellant,

vs.

LOUIS RUSSAK, Appellee.

DESIGNATION OF POINTS AND  
DESIGNATION OF RECORD

Comes now the appellant and pursuant to Rule 17 (6) of the Rules of the Court of Appeals for the Ninth Circuit and hereby makes the following Statement of Points:

1. The District Court erred in making the following Findings of Fact:

“That on the 22nd day of March, 1957, said defendant failed to exercise the highest degree of care consistent with the practical operation of said vessel in that it permitted the floor of the main lounge of that vessel to have and remain thereon spilled fruit and residue of fruit after a reasonable opportunity to remove the same. That as a direct and proximate result of the negligence of the defendant as aforesaid, while plaintiff was on the floor of said lounge, plaintiff slipped and fell violently to the floor.”

2. No evidence was introduced to support said findings, nor can any inference be drawn from the evidence introduced to support said findings and they should be set aside as clearly erroneous.

3. No competent evidence was introduced as to the nature of the alleged slippery condition; no evidence was introduced as to how or when the alleged slippery condition came to be on the dance floor, length of time it had been present there, knowledge on the part of the defendant as to its presence or a reasonable opportunity on the part of defendant to correct said condition.

4. The District Court erred in not admitting the Deposition Upon Oral Examination Before Trial of Louis Russak into evidence or in not permitting defendant to introduce portions of said testimony into evidence.

The appellants herein make the following Designation of Record Material to the Appeal:

1. Petition for Removal, filed October 22, 1957, with copy of the Complaint attached.
2. Answer of Defendant, filed November 5, 1957.
3. Reply, filed January 24, 1958.
4. The following designated portions of the Deposition Upon Oral Examination Before Trial of Louis Russak, marked as Defendant's Exhibit "A"):

Page: 8—line: 20-22 inclusive. Page 10—line: 7-14 inclusive. Page: 14—line: 2-5 inclusive; 22-25 inclusive. Page: 15—line: 1; 23-25 inclusive. Page: 16—line: 1-11 inclusive. Page: 17—line: 16-25 inclusive. Page: 18—all lines. Page: 19—line: 1-9 inclusive. Page: 24—line: 21-25 inclusive. Page: 25—line: 1-12 inclusive.

5. Findings of Fact and Conclusions of Law, filed July 2, 1958.
6. Judgment, filed July 2, 1958.
7. Notice of Appeal, filed July 29, 1958.
8. Bond on Appeal and Supersedeas Bond, filed August 4, 1958.
9. The following designated portions of the Transcript of Proceedings and Evidence:

Page: 3—line: 1; 20-25. Page: 4—line: 1-13 inclusive. Page: 5—line: 5-7 inclusive. Page: 6—line: 10-25 inclusive. Page: 7, 8—all lines. Page: 9—line: 1-11 inclusive. Page: 31—line: 7-8 inclusive. Page: 41—line: 14-25 inclusive. Page: 42, 43, 44, 45—all

lines. Page: 46—line: 1-7 inclusive. Page: 50—line: 20-25 inclusive. Page: 51—line: 1-2 inclusive; 19-25 inclusive. Page: 52, 53, 54, 55—all lines. Page: 56—line: 1-25 inclusive. Page: 57, 58—all lines. Page: 59—line: 6-25 inclusive. Page: 60-61—all lines. Page: 62—line: 1-21 inclusive. Page: 65—line: 1-11 inclusive. Page: 67—line: 7-25 inclusive. Page: 68, 69—all lines. Page: 70—line: 1-10 inclusive. Page: 83—line: 1-10 inclusive; 19-25 inclusive. Page: 84—line: 1-3 inclusive; 7-8 inclusive; 19-25 inclusive. Page: 85-94 incl.—all lines. Page: 95—line: 1-21 inclusive. Page: 101, 102—all lines. Page: 103—line: 1-2 inclusive. Page: 121—line: 16-25 inclusive. Page: 122—all lines. Page: 123—line: 1-13 inclusive.

BOGLE, BOGLE & GATES,

Attorneys for Appellant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed September 3, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S SUPPLEMENTAL STATE-  
MENT OF POINTS AND DESIGNATION  
OF RECORD

Comes now the appellant and in response to Appellee's Designation of Additional Portions of Record on Appeal makes the following Supplemental Statement of Points:

5. The District Court erred in permitting the plaintiff, Louis Russak, and his wife, Deanna Russak, to testify as to statements made by the cruise director appearing in the reporter's Transcript of Proceedings, page 9, line 25 to page 10, line 6, and page 71, line 3 to line 10.

6. The District Court erred in permitting the plaintiff, Louis Russak, to testify as to statements made by him to the ship's doctor appearing on page 12, lines 19 and 20.

Appellant makes the following supplemental designation of additional portions of the reporter's Transcript of Proceedings: Page 56, lines 11 to 25, inclusive.

BOGLE, BOGLE & GATES,  
Attorneys for Appellant.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed September 11, 1958. Paul P. O'Brien, Clerk.

